

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
AT CHARLESTON

	x	
	:	
UNITED STATES OF AMERICA,	:	Criminal Action
	:	
Plaintiff,	:	No. 2:14-cr-00112
	:	
v.	:	
	:	Date: July 10, 2014
ALVIS R. PORTER,	:	
	:	
Defendant.	:	
	x	

TRANSCRIPT OF PLEA HEARING HELD
BEFORE THE HONORABLE THOMAS E. JOHNSTON, JUDGE
UNITED STATES DISTRICT COURT
IN CHARLESTON, WEST VIRGINIA

APPEARANCES:

For the Government:	AUSA MEREDITH G. THOMAS U.S. Attorney's Office P.O. Box 1713 Charleston, WV 25326-1713
For the Defendant:	J. TIMOTHY DIPIERO, ESQ. Ditrapano Barrett & Dipiero 604 Virginia Street East Charleston, WV 25301
Probation Officer:	Michele Jones
Court Reporter:	Ayme Cochran, RMR, CRR

Proceedings recorded by mechanical stenography;
transcript produced by computer.

1 PROCEEDINGS had before The Honorable Thomas E. Johnston,
2 Judge, United States District Court, Southern District of West
3 Virginia, in Charleston, West Virginia, on July 10, 2014, at 9:07
4 a.m., as follows:

5 COURTROOM DEPUTY CLERK: The matter before the Court is
6 the United States of America versus Alvis R. Porter, criminal
7 action number 2:14-cr-00112, scheduled for a plea hearing.

8 THE COURT: Good morning. Will counsel please note
9 their appearances?

10 MS. THOMAS: Meredith Thomas on behalf of the United
11 States.

12 MR. DIPIERO: Tim DiPiero on behalf of Mr. Alvis
13 Porter, who is also present, Your Honor.

14 THE COURT: All right. Good morning.

15 Mr. Porter, will you please stand, and I will ask the deputy
16 clerk to administer an oath to you at this time.

17 COURTROOM DEPUTY CLERK: Please raise your right hand.

18 **ALVIS R. PORTER, DEFENDANT, SWORN**

19 THE COURT: You may be seated.

20 Mr. Porter, do you understand that you are now under oath
21 and you must tell the truth and, if you testify falsely, you may
22 face prosecution for perjury or for making a false statement?

23 THE DEFENDANT: Yes, sir.

24 THE COURT: And, throughout the course of this hearing,
25 I'm going to be asking you a number of questions and I want to

1 make sure that you and I are communicating clearly. So, if at
2 any time you don't understand a question that I ask or anything
3 else that occurs in this hearing, I want you to feel free to
4 speak up and seek clarification.

5 Also, if at any time you need to confer with your attorney,
6 I'll be pleased to pause the proceedings to allow you to do so.

7 Do you understand all that?

8 THE DEFENDANT: Yes.

9 THE COURT: All right. Let's begin then with a
10 discussion similar to the discussion I had with Mr. DiPiero and
11 Mr. Rohr yesterday.

12 Mr. Porter, you have the right to the effective assistance
13 of counsel in this case. Now, that right includes the right to
14 have separate legal representation from any other defendant who
15 may be involved in this to -- in order to avoid conflicts of
16 interest. Now, I can't anticipate every potential conflict of
17 interest that could occur in any case, especially this one, when
18 I don't know that much about it yet. The lawyers know much more
19 about it than I do.

20 But, essentially, a conflict of interest arises because your
21 attorney, Mr. DiPiero, has a duty to be entirely loyal to you in
22 his representation of you in look -- and in the process of
23 looking out for your interests alone. He does represent three
24 other defendants in related cases. He has a similar duty --
25 actually, he has an identical duty to those defendants, as well,

1 to be loyal to them and to look out for their best interests.

2 In criminal litigation, there's a lot of potential for those
3 interests to come into conflict and that's what we are -- that's
4 what I'm concerned about in this discussion. An example of that
5 would be that, for example, at sentencing -- let's say at
6 sentencing, Mr. Rohr -- an issue came up in which your testimony
7 might be useful. That would -- that would put Mr. DiPiero in an
8 awkward position in which the Government might be calling you as
9 a witness against Mr. Rohr and Mr. DiPiero would be put in a
10 position where he would have to cross examine you and perhaps try
11 to question you in a way that would question your credibility in
12 an effort to execute his duty of loyalty to Mr. Rohr.

13 Just an example. Don't know if that would happen, but I'm
14 just trying to give you a sense of the possibilities of conflicts
15 of interest when one lawyer represents multiple individuals
16 involved in more or less the same set of cases.

17 Now, do you understand everything I've told you so far?

18 THE DEFENDANT: Yes, sir.

19 THE COURT: All right. Mr. DiPiero, I'm going to ask
20 you again, and I think that we can probably make this discussion
21 a little bit more brief than yesterday since we were sort of
22 feeling our way through it yesterday, but I would ask you to
23 place on the record the circumstances of your representation of
24 Mr. Porter and your perspective on the issue of potential
25 conflicts of interest.

1 I do note for the record, as I did in the other one -- and,
2 by the way, I have the waivers in the record in Mr. Rohr's case
3 and I will adopt those for the record for this case, as well.

4 Staci, do you have a copy of that?

5 MR. DIPIERO: I have copies, if you want them, Your
6 Honor.

7 THE COURT: I'm going to need a copy then of --I
8 believe Mr. Porter and Mr. Rohr are on the same waiver.

9 MR. DIPIERO: No. There are different ones. It's
10 okay.

11 THE COURT: All right. And, Mr. Porter, I want you to
12 listen carefully to this discussion and, in particular, at this
13 point, to Mr. DiPiero's comments.

14 MR. DIPIERO: I'll try to be brief, Your Honor. We had
15 -- our firm had represented Mr. Porter a couple years ago on a
16 civil matter. He was in a serious car accident and I ended up
17 representing him on that.

18 And then he learned of a subpoena, I think, back in January
19 of this year and he called me about that and asked me to
20 represent him in regards to any possible investigation that was
21 going on, and so I did, and he made contact with the United
22 States Attorney's Office. They weren't ready to really meet with
23 me yet.

24 And a couple of months later, you know, some federal agents
25 approached Mr. Rohr, who I have known for several years, and he

1 immediately called me and asked me to be his attorney, and I said
2 I have -- "I'm representing Alvis" and I explained the situation
3 to him. I called Mr. Porter and I explained -- after Mr. Rohr
4 said it would be okay with him.

5 And I called Mr. Porter and, as I mentioned yesterday, they
6 really -- even though they've known each other well for many
7 years, their businesses have really no -- no real connection with
8 respect to Arch Coal.

9 And so, what happened, which was kind of unusual, is that
10 Gary said, "My partner wants -- we want to come in and cooperate
11 together. We want you to represent both. We want you to
12 represent both of us."

13 So, I called -- first off, I also called the United States
14 Attorney's Office before I called Mr. Potter to see if it was
15 okay by them. I did call the United States Attorney's Office. I
16 again called Mr. Porter and, as it so happens, we met several
17 hours here on March 23rd.

18 I think they approached Mr. Rohr on March 21st. So this
19 happened very, very quickly. They both wanted to cooperate
20 immediately.

21 The next day -- they -- they asked Mr. Herndon, who was a
22 partner of Mr. Ellis', not to speak to him because they wanted to
23 see if Mr. Ellis would come clean and come truthful because they
24 were meeting with him the next day. He did, and I got a call
25 that says, "He needs an attorney." You know, "Do you think you

1 can?" I said, "Well, do you think I can", and it was just kind
2 of that conversation. I said, "It's really unusual, but they're
3 partners, too. He's telling the exact same story. They're
4 cooperating fully." By "story", I mean telling the facts the
5 same.

6 And so, again, I had to call Mr. Potter and, in each
7 instance, I explained to Mr. Porter, again, he really has no
8 connection. The others do have some connection, obviously,
9 business-wise, but he really has no connection.

10 They know each other. It's a small town. They know each
11 other and, through that process, I got approval from Mr. Ellis,
12 and Mr. Rohr, and Mr. Herndon, as well as Mr. Porter, to go ahead
13 with Mr. Ellis. That's not really a short version, but it's
14 about what happened.

15 Through the process, I was communicating with each, and I
16 got a waiver prepared for each of them, and then I was told that
17 Judge Copenhaver -- I didn't know who was going to get this --
18 Judge Copenhaver sometimes likes the paragraph that says
19 specifically that -- an example you raised that could come up,
20 which could knock me out of representing either person; if I was
21 happening to cross examine one client for another client, I might
22 be knocked out of both. So, that's why the extra paragraph was
23 put into these waivers.

24 And so, Judge, it's the first time it's ever happened to me,
25 but it was just a very unusual set of circumstances where I

1 believe strongly that we are not going to have a problem. I know
2 -- I didn't know your history of someone saying that and then --
3 and then it not being true eventually, but I really sincerely
4 believe -- and would not put myself in this position for them or
5 for myself if I didn't believe it very strongly.

6 THE COURT: Ms. Thomas?

7 MS. THOMAS: The United States has no objection to Mr.
8 DiPiero representing all four defendants. Again, as I said
9 yesterday, at this point in time, we have no reason to believe
10 that such an issue regarding testimony at sentencing will come
11 up.

12 THE COURT: All right. Okay. I want to just ask a few
13 more questions and make sure that we're all on the same page.

14 Mr. Porter, did you hear everything that your attorney just
15 said?

16 THE DEFENDANT: Yes, sir.

17 THE COURT: All right. Did you understand all of that?

18 THE DEFENDANT: Yes, sir.

19 THE COURT: Are you understanding this entire
20 discussion?

21 THE DEFENDANT: Yes, sir.

22 THE COURT: And are these matters that you have
23 discussed with your attorney prior to this hearing?

24 THE DEFENDANT: Yes, sir.

25 THE COURT: Do you understand that there's a danger in

1 having your lawyer represent someone who has, maybe not an
2 interest in the outcome of this case but, nonetheless, who is
3 facing criminal charges in a related investigation to yours; in
4 other words, there's danger of a potential conflict of interest?

5 THE DEFENDANT: Yes, sir.

6 THE COURT: All right. And did -- in addition to
7 explaining all of this to you, did Mr. DiPiero answer any
8 questions that you had about this?

9 THE DEFENDANT: Yes, sir, Your Honor.

10 THE COURT: And, notwithstanding your attorney's
11 representation of these three other individuals, do you want your
12 attorney to continue to represent you in this case?

13 THE DEFENDANT: Yes, sir, Your Honor.

14 THE COURT: Do you understand that if you didn't want
15 Mr. DiPiero to represent you, that the Court would continue this
16 matter so that you would have time to hire another attorney?

17 THE DEFENDANT: Yes, sir.

18 THE COURT: And, knowing all of this, you would still
19 like to proceed?

20 THE DEFENDANT: Yes, sir.

21 THE COURT: I note that you have -- I've been provided
22 with a Waiver of Conflict -- Potential Conflict of Interest Form.
23 That has been signed by you; is that correct?

24 THE DEFENDANT: Yes, sir.

25 THE COURT: And have you read that form?

1 THE DEFENDANT: I have.

2 THE COURT: And have you gone over that with your
3 attorney?

4 THE DEFENDANT: I have.

5 THE COURT: Do you believe that you fully understand
6 the contents of that form?

7 THE DEFENDANT: Yes, sir.

8 THE COURT: Did your attorney answer any questions that
9 you may have had about the content of the form?

10 THE DEFENDANT: Yes, sir.

11 THE COURT: All right. Anything about this form or
12 waiver that you don't understand or that you have questions
13 about?

14 THE DEFENDANT: No, sir.

15 THE COURT: All right. I will go ahead and make this
16 copy of the waiver a part of the record for this proceeding. It
17 would be an onus statement to say that I'm convinced that this is
18 going to work out, but based on the record that I have right now,
19 I think we can go ahead and move forward, which we will -- which
20 we will do.

21 All right. Mr. Porter, let's begin by -- by -- I'll ask
22 you, how old are you?

23 THE DEFENDANT: 61.

24 THE COURT: And can you briefly describe your
25 educational background?

1 THE DEFENDANT: I have a high school education and one
2 and a half years of college.

3 THE COURT: And can you read and write and understand
4 the English language?

5 THE DEFENDANT: Yes, sir.

6 THE COURT: Can you briefly describe your work
7 experience?

8 THE DEFENDANT: I did -- I worked on a coal prep plant
9 and run equipment and did excavation work. And when the mines
10 got real slow, I took a job -- I ran for an office and was
11 Circuit Clerk in Logan County for several years, and then went
12 back into the construction business, back into the excavation
13 earth-moving part of the construction.

14 THE COURT: All right. Have you taken any medicine or
15 drugs or consumed any alcoholic beverages within the last
16 24 hours?

17 THE DEFENDANT: Yes, sir. I've took my normal
18 medicines.

19 THE COURT: Okay. Do you have a list of those?

20 THE DEFENDANT: I do.

21 THE COURT: All right. Maybe I'll ask the -- your
22 attorney to tender those to the Court and then we'll go over them
23 quickly. Are these -- is this a similar list to what's listed in
24 the Pretrial Services Report?

25 THE DEFENDANT: Yes, sir.

1 MR. DIPIERO: I believe so.

2 THE DEFENDANT: Yes.

3 MR. DIPIERO: We just got that. Yes.

4 THE COURT: This is a pretty long list.

5 THE DEFENDANT: It is.

6 THE COURT: Did you take all of these in the last
7 24 hours?

8 THE DEFENDANT: All of them except the last one that I
9 wrote in down there. I only take that when I have severe back
10 pain, which is, you know, once every four, five, six months.

11 THE COURT: Okay.

12 THE DEFENDANT: Usually, a prescription will last me a
13 year or longer.

14 THE COURT: All right. So, I'm just going to run
15 through this very quickly.

16 THE DEFENDANT: Okay.

17 THE COURT: And I'm going to try to pronounce this
18 correctly. Maybe what we'll do is make a copy of this. I don't
19 know that we need to put it in the record, but the probation
20 officer will need it.

21 Multi vitamin, mineral supplement -- that's not a
22 prescription drug. So, there's Maxzide for blood pressure.
23 That's a diuretic or a water pill?

24 THE DEFENDANT: That's a diuretic, yes, sir.

25 THE COURT: All right. And Zoloft, an antidepressant;

1 Glucotrol for diabetes?

2 THE DEFENDANT: Norvasc for blood pressure?

3 THE DEFENDANT: Yes.

4 THE COURT: Lantus Solostar?

5 THE DEFENDANT: Yes, sir.

6 THE COURT: That's for diabetes?

7 THE DEFENDANT: That's an injection, yeah.

8 THE COURT: All right. And you've had that within the
9 last 24 hours?

10 THE DEFENDANT: I have.

11 THE COURT: Okay. Pepcid, that's for acid. That's
12 probably not a prescription; or is it?

13 THE DEFENDANT: It is a prescription.

14 THE COURT: Prescription strength? Okay. That's for
15 acid reflex. Ativan for anxiety; Plavix, which is a blood
16 thinner; Toprol, which is for your blood pressure.

17 THE DEFENDANT: Yes, sir.

18 THE COURT: And Lipitor for cholesterol.

19 THE DEFENDANT: Yes, sir.

20 THE COURT: That's all you've taken within the last
21 24 hours?

22 THE DEFENDANT: No, sir. I have also taken -- and I
23 thought it was on there. I take two over-the-counter fish oil
24 pills and an aspirin each day.

25 THE COURT: Yeah. It's not on there, but those are

1 both over-the-counter?

2 THE DEFENDANT: Yes, sir.

3 THE COURT: All right. So, my question then for all of
4 this is, to the best of your knowledge, as you sit here today,
5 are you suffering from any side effects from any of those
6 medications that would in any way affect your ability to fully
7 participate in this hearing today?

8 THE DEFENDANT: No, sir.

9 THE COURT: All right. Have you ever been treated for
10 any mental illness or addiction to drugs of any kind?

11 THE DEFENDANT: No, sir.

12 THE COURT: I note that there are a couple -- there's
13 anxiety and depression medications on your list there. Are those
14 prescribed by your family physician?

15 THE DEFENDANT: They are.

16 THE COURT: All right. Do you know where you are and
17 why you are here today?

18 THE DEFENDANT: Yes, sir.

19 THE COURT: Do you have any hearing impairment or other
20 disability which would prevent you from fully participating in
21 this hearing today?

22 THE DEFENDANT: No, sir.

23 THE COURT: Mr. DiPiero, do you have any reason to
24 question the competence of your client?

25 MR. DIPIERO: No, sir, Your Honor. Those -- those

1 pills are as a result of the car accident, the ones with the
2 anxiety and depression, where a young man was killed in that
3 wreck.

4 THE COURT: All right. And I -- there's been -- other
5 than that medication, there's been no other mental health
6 treatment?

7 THE DEFENDANT: No, sir.

8 THE COURT: All right. All right. The original of the
9 plea agreement, I believe, has been tendered to the Court. Is
10 this the same -- have there been any modifications to the
11 agreement since I was provided one before the hearing?

12 MS. THOMAS: No, Your Honor.

13 THE COURT: All right. Very well.

14 All right. Mr. Porter, is that your signature that appears
15 on the tenth and final page of the plea agreement?

16 THE DEFENDANT: Yes, sir, it is.

17 THE COURT: And are those your initials that appear on
18 the other pages of the plea agreement?

19 THE DEFENDANT: Yes, sir, it is.

20 THE COURT: And have you read and reviewed with your
21 attorney each of the 20 paragraphs of the plea agreement and the
22 exhibits attached to the plea agreement?

23 THE DEFENDANT: Yes, sir.

24 THE COURT: And do you wish to have the various terms
25 of the plea agreement orally stated on the record or do you

1 believe that that's unnecessary?

2 THE DEFENDANT: I believe that's unnecessary.

3 THE COURT: All right. And do you understand and agree
4 with all of the terms and provisions contained in the plea
5 agreement and its exhibits?

6 THE DEFENDANT: Yes, sir.

7 THE COURT: Mr. DiPiero, have you reviewed each of the
8 20 paragraphs of the plea agreement and its exhibits with your
9 client?

10 MR. DIPIERO: I have, Your Honor.

11 THE COURT: And, Mr. DiPiero and Ms. Thomas, are there
12 any reasons why either of you believe that the various terms of
13 the plea agreement should be orally stated on the record?

14 MS. THOMAS: No, Your Honor.

15 MR. DIPIERO: No, Your Honor.

16 THE COURT: All right. Very well. Nonetheless, Mr.
17 Porter, there are several provisions of the plea agreement I want
18 to talk with you about, beginning with Section 5, which appears
19 on Page 2 and runs over onto Page 3. Section 5 is entitled
20 "Restitution" and, in the beginning of it, on Page 2, it recites
21 that you agree that you owe restitution in the amount of
22 \$26,951.48, plus interest. That's restitution to the IRS, am I
23 correct?

24 MS. THOMAS: Yes, Your Honor.

25 THE COURT: All right. Very well.

1 Do you understand that?

2 THE DEFENDANT: Yes, sir.

3 THE COURT: All right. And then, Subsection (e) to
4 Section 5 is an appeal waiver and, first of all, let me ask you,
5 do you understand that a "waiver" is a legal term that means you
6 are giving something up?

7 THE DEFENDANT: Yes, sir.

8 THE COURT: All right. So, in Subsection (e) of
9 Section 5 on Page 3, do you understand that you waive the right
10 to appeal any order of restitution unless the amount of
11 restitution imposed exceeds the amount set forth in this
12 paragraph? Do you understand that waiver?

13 THE DEFENDANT: Yes, sir.

14 THE COURT: All right.

15 MR. DIPIERO: Your Honor?

16 THE COURT: Yes?

17 MR. DIPIERO: If I could, he has tendered to me a check
18 in this amount of \$26,951.48 for me to pass on, but we have
19 learned that there may be certain amended returns that may have
20 to be done to make that -- make that done officially. We're not
21 really sure exactly how to do that, but we're working on that
22 phase, but the money has been tendered to me, and the restitution
23 -- I mean, the forfeiture check has already been paid, but this
24 one has been tendered to me. I have it. It's just a matter of
25 what form that's going to take and how we're going to accomplish

1 that.

2 THE COURT: All right. Very well. Thank you.

3 And then, in Paragraph 6, Mr. Porter, do you understand that
4 any order of restitution will be used by the IRS as a basis for a
5 civil assessment?

6 THE DEFENDANT: Yes, sir.

7 THE COURT: All right. Then, that's on Page 3.

8 On Page -- also, I want to refer you to Section 7 of the
9 plea agreement. I understand that your attorney has said you
10 already paid over the amount agreed to with regard to the
11 forfeiture matter, but I want to go over that with you anyway.

12 Section 7 is entitled "Forfeiture". It begins on Page 3 and
13 runs over to Page 5, actually. It does recite that you agree in
14 lieu of other property to pay over to the IRS \$350,000.00 as a --
15 an administrative forfeiture and that's in Subsection C of
16 Section 7.

17 Subsection (g) provides that you will waive any defenses to
18 the forfeiture action. Do you understand that waiver?

19 THE DEFENDANT: Yes, sir.

20 THE COURT: All right. Next, I want to refer you to
21 Section 13, which begins on Page 6 and runs over onto Page 7.
22 It's entitled "Stipulation of Facts and Waiver of Federal Rule of
23 Evidence 410".

24 Now, this section relates to a couple of different matters,
25 the first of which is the Stipulation of Facts, which is attached

1 to the plea agreement as Exhibit B, and I want to turn your
2 attention to that document now.

3 That is a three-page document and, on the third page, is
4 that your signature which appears there?

5 THE DEFENDANT: Yes, sir, it is.

6 THE COURT: And have you read the Stipulation of Facts?

7 THE DEFENDANT: I have, sir.

8 THE COURT: And do you agree that all of the facts
9 contained in the stipulation are true?

10 THE DEFENDANT: Yes, sir.

11 THE COURT: All right. A little bit about what will be
12 happening from here on out.

13 I will be asking the probation officer to prepare a
14 Presentence Investigation Report. That report will contain
15 detailed recommended factual findings regarding this offense and
16 your background, among other things.

17 Ultimately, at sentencing, I will make factual findings
18 based at least in part on the recommendations contained in the
19 report.

20 Now, you and the Government have reached an agreement
21 regarding certain facts contained in the stipulation, but I want
22 you to understand that, in this process, neither the probation
23 officer, nor this Court, are bound by that Stipulation of Facts.
24 Do you understand that?

25 THE DEFENDANT: Yes, sir.

1 THE COURT: Do you further understand that if I make
2 findings of fact at sentencing that are different from or
3 inconsistent with the facts contained in the stipulation, you
4 will still be bound by your guilty plea and would have no right
5 to withdraw it? Do you understand that?

6 THE DEFENDANT: Yes, sir.

7 THE COURT: All right. Now, the other matter addressed
8 in Section 13 is a waiver of Federal Rule of Evidence 410.

9 Now, 410 generally provides that information or documents
10 regarding plea negotiations, and this Stipulation of Fact would
11 fall into that category, is generally not admissible at trial.
12 In other words, the Government can't usually use that sort of
13 thing against you at trial.

14 However, under this waiver, if you withdraw from the plea
15 agreement or if it's no longer any good because you have violated
16 one or more of its terms and there is a subsequent trial, then
17 the Government would be allowed to present the Stipulation of
18 Facts in its case in chief or for other purposes at that trial?
19 Do you understand that waiver?

20 THE DEFENDANT: Yes, sir.

21 THE COURT: All right. Next, I want to refer you to
22 Section 14 of the plea agreement, which appears on Page 7, and is
23 entitled "Agreement on Sentencing Guidelines".

24 Now, before we get into this, I want to talk with you a
25 little bit about the federal sentencing guidelines. Has your

1 attorney talked with you about the guidelines and explained to
2 you how they generally work?

3 THE DEFENDANT: Yes, sir.

4 THE COURT: Has he shown you that chart in the back of
5 the guidelines book?

6 THE DEFENDANT: He has.

7 THE COURT: All right. I want to have a similar
8 discussion with you sort of based on that chart. If you'll
9 recall, on the left side of the chart, there's a series of
10 numbers that run from low to high as you go down the page. Those
11 are offense levels. And the offense level is calculated by
12 starting with a Base Offense Level, which is a starting point,
13 and that can be adjusted upward or downward, depending on the
14 facts and circumstances of the case, to arrive at an adjusted
15 offense level.

16 Then, consideration can be given to a reduction for
17 acceptance of responsibility. Has your attorney talked with you
18 about that?

19 THE DEFENDANT: Yes, sir.

20 THE COURT: All right. Then, you generally arrive at a
21 Total Offense Level.

22 Then you go up to the top of the chart and there are six
23 criminal history categories, and you would fall into one of
24 those, depending on the number of points, if any, assigned to any
25 prior convictions that you may have.

1 Then you combine the criminal history category and the Total
2 Offense Level and arrive at a point in the chart that gives a
3 range of months of imprisonment and, in certain parts of the
4 chart, there are certain alternatives to imprisonment.

5 Do you understand all of this so far?

6 THE DEFENDANT: Yes, sir.

7 THE COURT: All right. Once we arrive at that range of
8 months, I have the authority to sentence you within that range.
9 I also have the authority, under certain circumstances, to
10 sentence you outside of that range, either above it or below it.

11 If I sentence you outside of the guidelines range based on
12 factors identified in the guidelines themselves, it's generally
13 known as a "departure".

14 If I sentence you outside of the guideline range, again,
15 above it or below it, based on factors outside of the guidelines,
16 that's generally known as a "variance".

17 Do you understand all of these things I've told you about
18 the guidelines?

19 THE DEFENDANT: Yes, sir, I have.

20 THE COURT: Has your attorney gone over all of those
21 things with you, as well?

22 THE DEFENDANT: Yes, sir.

23 THE COURT: All right. Well, with all of that in mind
24 then, Section 14 contains an agreement that you have reached with
25 the Government on one or more provisions of the guidelines. Now,

1 this is similar to the Stipulation of Fact in that the probation
2 officer's report, Presentence Report, will contain a recommended
3 guideline calculation.

4 Ultimately, at sentencing, I will make guideline findings
5 based at least in part on the recommendation made by the
6 probation officer.

7 Now, once again, you have reached an agreement with the
8 Government that's set forth here in Section 14, but I want you to
9 understand that, in this process, neither the probation officer,
10 nor this Court, are bound by that agreement on the guidelines.
11 Do you understand that?

12 THE DEFENDANT: Yes, sir, I do.

13 THE COURT: And do you further understand that if I
14 make guideline findings at sentencing that are different from or
15 inconsistent with this agreement, you will still be bound by your
16 guilty plea and would have no right to withdraw it?

17 THE DEFENDANT: Yes, sir.

18 THE COURT: All right. Next, I want to refer you to
19 Section 15 of the plea agreement, which begins on Page 7 and runs
20 over onto Page 8, and is entitled "Waiver of Appeal and
21 Collateral Attack".

22 Now, this section relates to a couple of different
23 procedures that I want to describe to you briefly.

24 An "appeal" is a procedure by which a party to case before a
25 District Court like this one and, in a criminal case, it's often

1 the defendant, goes to the Court of Appeals, or the next level up
2 of the court system, and argues that certain errors or mistakes
3 may have taken place in their criminal case before the District
4 Court.

5 A "collateral attack", which is sometimes referred to as a
6 "habeas corpus petition", is a separate civil matter in which a
7 defendant may also argue, after their criminal case is over, that
8 certain errors or mistakes may have taken place in their criminal
9 case before the District Court.

10 Now, do you understand those two procedures, at least as
11 I've briefly described them to you?

12 THE DEFENDANT: Yes, sir.

13 THE COURT: All right. Now, the other thing I want to
14 go over with you before we get into Section 15, is that there are
15 two phases to a criminal case. The first phase is the phase in
16 which guilt or innocence is determined, sometimes by a trial;
17 much more often by a guilty plea like what we're doing today.
18 That phase of the case starts at the very beginning of the case
19 and runs throughout the case until that determination is made.

20 The second phase of the case is the penalty phase in which,
21 obviously, the penalty is determined and it concludes generally
22 with a sentencing hearing at the end of the case.

23 Now, do you understand the two phases of a criminal case as
24 I have described them to you?

25 THE DEFENDANT: Yes, sir.

1 THE COURT: All right. With all of that in mind then,
2 in the first paragraph, we have an appeal waiver, and I want to
3 go over that with you now.

4 Do you understand that, in the first paragraph, you waive
5 the right to appeal your conviction and any sentence of
6 imprisonment, fine or term of supervised release, or the manner
7 in which the sentence was determined, so long as your sentence is
8 within or below the guideline range corresponding to an offense
9 level 12?

10 THE DEFENDANT: Yes, sir.

11 THE COURT: Do you understand that waiver?

12 THE DEFENDANT: Yes, sir.

13 THE COURT: Anything about it that you don't understand
14 or that you have questions about?

15 THE DEFENDANT: No, sir.

16 THE COURT: All right. In the second paragraph, do you
17 also understand that you may not file a later civil proceeding,
18 sometimes referred to as a "collateral attack" or a "habeas
19 corpus petition", challenging your plea, conviction or sentence?

20 THE DEFENDANT: Yes, sir, I understand that.

21 THE COURT: And, finally, do you understand that you
22 are in no event waiving your right to claim ineffective
23 assistance of counsel either on appeal or by collateral attack?

24 THE DEFENDANT: Yes, sir.

25 THE COURT: All right. Finally, I want to refer you to

1 Section 16, which appears on Page 8, and is entitled "Waiver of
2 FOIA and Privacy Right".

3 Now, this waiver means you can't go back after this case is
4 over and seek documents or other information about the case, even
5 with a Freedom of Information Act request. Do you understand
6 that waiver?

7 THE DEFENDANT: Yes, sir.

8 THE COURT: Mr. DiPiero, have you thoroughly reviewed
9 the plea agreement with your client?

10 MR. DIPIERO: I have, Your Honor.

11 THE COURT: Do you believe he fully understands the
12 various terms and conditions of the plea agreement, including the
13 waivers and other matters that I have gone over with him this
14 morning?

15 MR. DIPIERO: I do, Your Honor.

16 THE COURT: Mr. Porter, have you reviewed the plea
17 agreement in detail with your attorney?

18 THE DEFENDANT: Yes, sir.

19 THE COURT: And do you believe that you have had
20 adequate time to discuss your case fully with your attorney?

21 THE DEFENDANT: Yes, sir, Your Honor.

22 THE COURT: And has your attorney answered any
23 questions that you've had about your case?

24 THE DEFENDANT: Yes, sir.

25 THE COURT: Mr. DiPiero, during your representation of

1 the defendant, has he been cooperative?

2 MR. DIPIERO: Absolutely.

3 THE COURT: Mr. Porter, has anything further been
4 agreed to, either or orally or in writing, that is not contained
5 in the plea agreement?

6 THE DEFENDANT: No, sir.

7 THE COURT: All right. I will order that the plea
8 agreement be filed.

9 I will find that the defendant understands and agrees with
10 the terms contained in the plea agreement.

11 I will defer accepting or rejecting the plea agreement until
12 sentencing, after the Presentence Report has been received and
13 considered.

14 Now, Mr. Porter, have you received and read and reviewed
15 with your attorney the information or proposed charging document
16 in this case?

17 THE DEFENDANT: Yes, sir.

18 THE COURT: And do you understand the charges contained
19 in the information?

20 THE DEFENDANT: Yes, sir.

21 THE COURT: Would you like me to read the information
22 to you or will you waive the reading of the information?

23 THE DEFENDANT: I'll waive it.

24 THE COURT: As I understand it, you will be pleading
25 guilty to a single-count information, which charges you with

1 willful failure to collect and pay over payroll tax in violation
2 of 26 USC Section 7202. I now want to go over that charge and
3 that statute with you in just a little bit more detail.

4 Section 7202 provides in pertinent part that:

5 "Any person required under this title to collect, account
6 for, and pay over any tax imposed by this title who willfully
7 fails to collect or truthfully account for and pay over such tax
8 shall, in addition to the other penalties provided by law, be
9 guilty of a crime against the United States."

10 Now, in order to prove that charge against you, the
11 Government would have to prove the following elements of that
12 charge each beyond a reasonable doubt, and they are:

13 First, that you were required by law or regulation to
14 collect, account for, and pay over a federal tax;

15 And, second, you failed to collect or to truthfully account
16 for and pay over the tax;

17 And, third, your failure was willful.

18 Now, I'm going to share with you some definitions that apply
19 to what I just told you.

20 First of all, to act "willfully" means to act voluntarily
21 and deliberately and with the intention to violate a known legal
22 duty.

23 Negligent conduct is not enough to constitute willfulness.

24 Willfulness requires the Government to prove that the law
25 imposed a duty on you, that you knew of this duty, and that you

1 voluntarily and intentionally violated that duty.

2 The term "person" includes an officer or employee of a
3 corporation, or a member or employee of a partnership, who will,
4 as such officer, employee, or member, is under a duty to perform
5 the act in respect of which the violation occurs.

6 An officer or employee of a corporate employer is a person
7 that can be convicted of violating Section 7202.

8 I would also note that, although it's not specified in the
9 elements that I've recited, that the payroll taxes are subject to
10 Section 7202.

11 Is there any objection to the elements as I have described
12 them?

13 MS. THOMAS: No, Your Honor.

14 MR. DIPIERO: No, Your Honor.

15 THE COURT: All right. Next, Mr. Porter, I want to go
16 over with you the maximum and any minimum sentences you may face
17 as a result of your plea, and that is a maximum term of
18 imprisonment of five years; a maximum fine of \$250,000.00, or
19 twice the gross pecuniary gain on loss resulting from your
20 conduct, whichever is greater; a maximum term of supervised
21 release of three years. A mandatory special assessment of
22 \$100.00 would be required. Restitution could be ordered if it
23 were found to be applicable, as it appears it may be.

24 Next, I want to return to our discussion of the guidelines.
25 They are advisory, meaning they're not mandatory or don't have to

1 be followed, but they'll nevertheless play an important role in
2 your case from here on out.

3 This Court will consider the factors set forth in 18 U. S.
4 C. Section 3553(a), including the advisory guidelines in
5 determining the appropriate sentence in this case.

6 I now want to ask you some questions that will help me
7 understand your understanding of the guidelines.

8 Have you discussed with your attorney the various factors
9 which apply in determining what the sentence in your case may be
10 under the advisory guidelines?

11 THE DEFENDANT: Yes, sir.

12 THE COURT: And do you understand that under this
13 single-count information, you cannot in any event receive a
14 greater sentence than the statutory maximum that I explained to
15 you earlier?

16 THE DEFENDANT: Yes, sir.

17 THE COURT: Do you understand that the Court will not
18 determine a sentence for your case until a later date, when a
19 Presentence Report has been completed, and both you and the
20 Government have had an opportunity to challenge the facts and
21 analysis reported by the probation officer?

22 THE DEFENDANT: Yes, sir.

23 THE COURT: Do you understand that under a concept
24 known as "relevant conduct", this Court, in determining the Total
25 Offense Level for sentencing purposes under the guidelines may

1 take into account any conduct, circumstances or injuries relevant
2 to the crime of which you may be convicted?

3 THE DEFENDANT: Yes, sir.

4 THE COURT: Do you understand that after the Court has
5 determined what advisory guidelines apply to your case, the Court
6 has the authority to vary or depart from the advisory guidelines
7 and impose a sentence that is more severe or less severe than the
8 sentence called for by the guidelines?

9 THE DEFENDANT: Yes, sir.

10 THE COURT: Do you understand that in determining your
11 sentence, the Court is obligated to calculate the applicable
12 sentencing guideline range, and to consider that range, possible
13 departures under the guidelines, and other sentencing factors
14 under 18 U. S. C. Section 3553(a)?

15 THE DEFENDANT: Yes, sir.

16 THE COURT: Do you understand that parole has been
17 abolished and, if you're sentenced to prison, you will not be
18 released on parole?

19 THE DEFENDANT: Yes, sir.

20 THE COURT: Do you understand if the Court accepts your
21 plea of guilty and the sentence ultimately imposed upon you is
22 more severe than you had hoped for or expected, you will still be
23 bound by your guilty plea and would have no right to withdraw it?

24 THE DEFENDANT: Yes, sir.

25 THE COURT: Do you understand that if you plead guilty

1 to this single-count information which charges you with a felony
2 you may lose important civil rights, such as the right to vote;
3 the right to serve on a jury; the right to hold public office;
4 and the right to own or possess a firearm?

5 THE DEFENDANT: Yes, sir.

6 THE COURT: All right. Mr. Porter, you have the right
7 to have this matter presented to a federal grand jury and I want
8 to briefly explain that process to you.

9 A grand jury is composed of at least 16 and not more than 23
10 persons, and at least 12 grand jurors must find that there is
11 probable cause to believe that you committed the crime with which
12 you are charged before you may be indicted.

13 Now, do you see any benefit of having this case presented to
14 a federal grand jury?

15 THE DEFENDANT: No, sir.

16 THE COURT: Do you see any prejudice or disadvantage to
17 you of not having the case presented to a federal grand jury?

18 THE DEFENDANT: No, sir.

19 THE COURT: All right. Your counsel has been provided
20 with a waiver of indictment form and I want to go over that with
21 you now. It contains the style of the case, *United States of*
22 *America v. Alvis R. Porter*, the criminal action number, and it's
23 entitled "Waiver of Indictment", and it states as follows:

24 "I, Alvis R. Porter, am accused of violating 26 U. S. C.
25 Section 7202. I have been advised of the nature of the charge,

1 *of the proposed information, and of my rights. I hereby waive in*
2 *open court prosecution by indictment and consent that the*
3 *proceeding may be by information rather than by indictment."*

4 And there's space for you to sign and date, space for your
5 counsel to sign, and space for me to sign.

6 Do you understand what I just read to you?

7 THE DEFENDANT: Yes, sir, I do.

8 THE COURT: Anything about the waiver of indictment
9 procedure that you don't understand or have questions about?

10 THE DEFENDANT: No, sir.

11 THE COURT: All right. Then, if you're prepared to do
12 so, I'll ask you to execute the Waiver of Indictment Form by
13 signing and dating it. Then, I will ask your counsel to sign it
14 and tender it to the Court.

15 All right. I'll note for the record that the defendant has
16 signed and dated the Waiver of Indictment Form. It has been
17 endorsed by his counsel, and I am now signing it, and I will
18 order that it be made a part of the record for this proceeding.

19 Next, Mr. Porter, I want to talk with you regarding your
20 trial and constitutional rights.

21 You have the right to plead not guilty and maintain a not
22 guilty plea throughout these proceedings, including at trial.

23 You have the right to be represented by counsel.

24 You have the right to a speedy and public trial by a jury
25 composed of citizens of this district.

1 You have the right to confront and have your attorney cross
2 examine witnesses and have your attorney move to suppress any
3 evidence he believes was illegally or unconstitutionally
4 obtained.

5 You have the right not to testify or otherwise incriminate
6 yourself and your exercise of this right cannot be held against
7 you.

8 Do you understand these rights so far?

9 THE DEFENDANT: Yes, sir.

10 THE COURT: You have the right to have the Government
11 come in here and prove its case beyond a reasonable doubt.

12 The jury's verdict would have to be unanimous.

13 You have the right to present evidence on your on behalf.

14 You have the right to testify on your own behalf at trial.

15 And you have the right to subpoena witnesses to testify for
16 you.

17 Do you understand all of these rights?

18 THE DEFENDANT: Yes, sir.

19 THE COURT: Any of them that you don't understand or
20 that you have questions about?

21 THE DEFENDANT: No, sir.

22 THE COURT: Do you understand that, other than your
23 right to counsel, you will be giving up all of these rights by
24 entering a plea of guilty?

25 THE DEFENDANT: Yes, sir.

1 THE COURT: Do you understand that, once you have
2 entered a plea of guilty, there is not going to be any trial, no
3 jury verdict, and no findings of innocence or guilt based on
4 disputed evidence presented to me or to a jury?

5 THE DEFENDANT: Yes, sir.

6 THE COURT: Do you believe that you fully understand
7 the consequences of entering a plea of guilty?

8 THE DEFENDANT: Yes, sir, I do.

9 THE COURT: Mr. DiPiero, having reviewed in detail this
10 case and the plea agreement with your client, do you believe that
11 he fully understands his rights and fully understands the
12 consequences of entering a plea of guilty?

13 MR. DIPIERO: Yes, Your Honor.

14 THE COURT: All right. I note that there is a
15 Stipulation of Facts that appears to address the elements of the
16 offense. Is there any objection to the Court utilizing the
17 stipulation in its consideration of the factual basis for the
18 plea?

19 MS. THOMAS: No, Your Honor.

20 MR. DIPIERO: No, Your Honor.

21 THE COURT: All right. The Court will so proceed,
22 although I do intend to defer making a factual basis finding.

23 Mr. Porter, will you please stand?

24 As to the charge contained in the single-count information,
25 how do you plead, sir, guilty or not guilty?

1 THE DEFENDANT: Guilty.

2 THE COURT: You may be seated.

3 Your counsel has been provided with a written plea of guilty
4 form. I would ask that you go over that with him, if necessary,
5 sign and date it. Then, I will ask him to sign it and tender it
6 to the Court.

7 All right. I'll note that the defendant has signed and
8 dated the written plea of guilty form, it has been witnessed by
9 his counsel, and I will order that it be made a part of the
10 record for this proceeding.

11 Mr. Porter, is this plea the result of any threat, or
12 coercion, or harassment of you by anyone?

13 THE DEFENDANT: No, sir.

14 THE COURT: Is it the result of any promise or
15 inducement other than those contained in the plea agreement?

16 THE DEFENDANT: No, sir.

17 THE COURT: Are you pleading guilty to protect anyone?

18 THE DEFENDANT: No, sir.

19 THE COURT: Are you acting voluntarily and of your own
20 free will in entering this guilty plea?

21 THE DEFENDANT: Yes, sir.

22 THE COURT: Has anyone promised or predicted the exact
23 sentence which will be imposed in your case?

24 THE DEFENDANT: No, sir.

25 THE COURT: Do you understand that no one could know at

1 this time the exact sentence which will be imposed?

2 THE DEFENDANT: Yes, sir.

3 THE COURT: Has your attorney adequately represented
4 you in this matter?

5 THE DEFENDANT: Yes, sir.

6 THE COURT: Has your attorney left anything undone
7 which you think should have been done?

8 THE DEFENDANT: No, sir.

9 THE COURT: Have you or your attorney found any defense
10 to the charge contained in the information?

11 THE DEFENDANT: No, sir.

12 THE COURT: Are you, in fact, guilty of the crime
13 charged in the information? In other words, did you do it?

14 THE DEFENDANT: Yes, sir, I am.

15 THE COURT: All right. I will find that the defendant
16 is competent and capable of entering an informed plea; that the
17 plea is freely and voluntarily made; that the defendant
18 understands the nature of the charges and is aware of the
19 consequences of the plea.

20 I will find that the defendant understands his rights and
21 understands that he is giving up these rights by entering a plea
22 of guilty.

23 I will defer a factual basis finding, but I will accept the
24 plea of guilty to the single-count information and will defer
25 adjudging the defendant guilty until the time of sentencing.

1 I will ask the probation officer to prepare a Presentence
2 Investigation Report.

3 Mr. Porter, it is important that you cooperate fully and
4 truthfully with the probation officer in the preparation of the
5 Presentence Report. If you fail to cooperate fully and
6 truthfully with the probation officer, you may be subject to an
7 enhancement of your sentence or the forfeiture of certain
8 sentence reductions for which you might otherwise be eligible.

9 It is also important that you not commit any additional
10 crimes between now and sentencing, as there may be additional
11 punishments imposed for committing additional crimes.

12 I'm going to set this matter for sentencing on October 16th,
13 2014, at 10:00 a.m.

14 I will put the other presentence dates in my post-plea
15 order.

16 What's the Government's position with regard to bond?

17 MS. THOMAS: No objection.

18 THE COURT: All right. I will allow the defendant to
19 be released today on a \$10,000.00 unsecured bond pending
20 sentencing.

21 I've already done my part of the paperwork. So, Mr.
22 DiPiero, you and your client just need to take care of your part
23 after the conclusion of the hearing.

24 The conditions will be the standard conditions and/or those
25 recommended in the Pretrial Services Report.

1 Anything else we need to take up today?

2 MS. THOMAS: No, Your Honor.

3 MR. DIPIERO: No, Your Honor. Thank you, sir.

4 THE COURT: All right. Thank you.

5 (Proceedings concluded at 9:53 a.m., July 10, 2014.)

6
7 CERTIFICATION:

8 I, Ayme A. Cochran, Official Court Reporter, certify that
9 the foregoing is a correct transcript from the record of
10 proceedings in the matter of United States of America, Plaintiff
11 v. Alvis R. Porter, Defendant, Criminal Action No. 2:14-cr-00112,
12 as reported on July 10, 2014.

13
14 s/Ayme A. Cochran, RMR, CRR

November 9, 2016

15 Ayme A. Cochran, RMR, CRR

DATE